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No. 87-281

In the Supreme Court of the United States

OCTOBER TERM, 1987

BERNARD H. GOLDSTEIN, ET AL., PETITIONERS

v.

HENRY CRAWFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioners, who were trustees of and participants in a pension plan, contend that the courts below improperly offset their entire interest in the plan against their adjudicated liability to the plan for breach of fiduciary duties. They primarily argue that the actual value of their interests in the profit-sharing plan exceeded the amount of their liability to the plan, thus entitling them to retain a portion of those interests.

1. Petitioners Bernard and Jack Goldstein were participants in and trustees of the District Hotel Supply, Inc., Profit Sharing Plan (the Plan), a pension plan established for the employees of two corporations owned and operated by petitioners. Between June 1979 and February 1982, petitioners transferred some $461,000 in Plan assets to or for the benefit of a real estate partnership owned by petitioner Bernard Goldstein (C.A. App. 334-337). This money was never repaid to the Plan, and petitioners did not make any agreement to repay the money or to pay interest on the amounts "borrowed" from the Plan. Peti-

tioners also transferred, between May 1980 and June 1982, a total of $163,000 from the Plan to one of the two sponsoring corporations and Plan assets were used to satisfy a tax obligation of that corporation. Additionally, a contribution to the Plan by a sponsoring corporation was declared but never paid. Petitioners engaged in other, similar transactions also prohibited by provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1101 *et seq.* Pet. App. 4a.

In March 1983, the Secretary of Labor and 15 participants in the Plan brought suit against petitioners, alleging that, by their diversions of Plan assets for their own benefit, they had breached their fiduciary duties as trustees of the Plan, and had violated ERISA's prohibited transactions provisions. See 29 U.S.C. 1104(a)(1)(A), (B) and (C), 1106(a)(1)(D), 1106(b)(1) and (2). The district court granted summary judgment in favor of the Plan against petitioners jointly and severally for $976,822.38, and against petitioner Bernard Goldstein individually for $20,999, and entered final judgment against them pursuant to Fed. R. Civ. P. 54(b). When petitioners failed to make any payments, the court granted the Plan participants' motion for equitable enforcement, ordering that the petitioners' own beneficial interests in the Plan be offset and applied to their judgment debts to the Plan. Pet. App. 5a-6a & n.2.

The court of appeals affirmed (Pet. App. 1a-13a). The court addressed only the district court's power to order offset, and did not review its judgment that petitioners had breached various fiduciary duties and owed the Plan nearly $1 million, because petitioners had failed to file a timely appeal challenging that judgment (*id.* at 5a-6a n.2). After reviewing the relevant statutory provisions and ERISA's legislative history concerning remedies for fiduciary breaches, the court concluded that the offset remedy adopted by the district court was consistent with Congress's intent to provide effective remedies for such

breaches and with its intent to protect beneficiaries from depletion of pension plan assets by wrongdoing trustees (*id.* at 6a-9a, 10a-12a).[1]

2. Petitioners claim that their interests in the Plan were undervalued and that the extent of their liability to the Plan was overestimated, and, as a result, their interests in the Plan should not have been offset entirely. They do not claim that the decision of the court of appeals conflicts with any decision of this Court or of any other court of appeals, and it does not. In that circumstance, none of the fact-bound issues raised by petitioners warrants review by this Court.

As we understand the first two questions petitioners present (see Pet. i, 14-15), they allege that their interests in the Plan were undervalued by the courts below. But neither the court of appeals' opinion nor the district court's order granting enforcement of the judgment through offset affixed any specific value to their interests in the Plan. Thus, petitioners inaccurately portray as "flawed" judgments that do not address the precise factual issue they wish to

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[1] The court of appeals also affirmed a judgment entered in favor of the 15 Plan participants on their claims against Bernard Goldstein under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.* (Pet. App. 12a-13a). Petitioners seem to request in their third question presented (Pet. i) that this Court review whether any of those claims are barred by the four-year statute of limitations adopted for civil RICO actions in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, No. 86-497 (June 22, 1987). Although the government is not a party to the RICO action, we note that the district court entered summary judgment against Bernard Goldstein under RICO based on the same facts on which judgment was entered against petitioners under ERISA. Since the Plan participants' complaint, stating both statutory causes of action, was filed in March 1983, less than four years after petitioners began the unlawful use of Plan assets in June 1979, it appears that the four-year statute of limitations, if otherwise applicable, was met in the case.

litigate.[2] In any event, whether the value of their interests in the Plan was miscalculated is not an issue warranting this Court's attention.[3]

Petitioners' fourth question presented (Pet. i) related to whether they may obtain review of the judgment finding them liable to the Plan in the amount of nearly $1 million. However, as the court of appeals concluded (Pet. App. 5a-6a n.2), they are barred from challenging that judgment. The district court entered final judgment on that issue pursuant to Fed. R. Civ. P. 54(b) on April 10, 1984. Their notice of appeal was not filed until September 4, 1984, nearly five months later (Pet. App. 5a n.2), although a notice of appeal was due within 60 days after entry of judgment (28 U.S.C. 2107; Fed. R. App. P. 4(a)). Petitioners' failure to file a timely appeal precluded appellate consideration of the issues resolved in the April 10 judgment, including the specific amount of petitioners' liability

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[2] In a separate action, *Goldstein* v. *Schotland*, Civ. Action No. 87-0228 (D.D.C.), petitioners have challenged the court-appointed receiver's acquiescence in the foreclosure sale of certain Plan property, arguing that rescission of the sale, and resale of the property at its fair market value, would increase the value of their interests in the Plan. The district court dismissed petitioners' complaint and a notice of appeal has been filed challenging that dismissal. Certain exhibits mentioned in the petition (Pet. 9-13) relate to that other proceeding, and are not part of the record in this case.

[3] Petitioners suggest (Pet. 14-15) that the Department of Labor agrees that their interest in the Plan exceeded the amount they owed to the Plan, so that the offset produced an inequitable result. That is not so. The Department argued precisely the opposite both in the district court and in the court of appeals. Petitioners rely (Pet. 14) on an unofficial appraisal of the "BRIL property" that listed its value at $1 million (with a mortgage of nearly half that amount). However, the sale of that property netted almost no profit after the mortgage and related expenses were paid (June 3, 1985, U.S. C.A. Br. 14 n.5). Therefore, petitioners' interest in the Plan turned out to be less than the amount of the judgment against them. As noted (note 2, *supra*), petitioners are seeking rescission of the sale of that property in a separate action.

to the Plan. See *Browder* v. *Director, Illinois Dep't of Corrections,* 434 U.S. 257, 264 (1978). The court of appeals therefore properly declined to review the underlying judgment that petitioners are liable for their breaches of fiduciary duty and owe the Plan nearly $1 million, and confined its review to the order granting equitable enforcement of that judgment. Petitioners' claim (see Pet. i, Question 4) that the underlying judgment should be reviewable because a motion for relief from judgment was filed under Fed. R. Civ. P. 60(b) on September 28, 1984, is wrong. The denial of a Rule 60(b) motion is reviewed under the abuse of discretion standard, and an appeal from a denial of a motion for relief from judgment does not bring up the underlying judgment for review. *Browder*, 434 U.S. at 263 n.7.[4]

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[4] The question primarily considered by the court of appeals, whether the anti-alienation provisions of ERISA and the Internal Revenue Code bar the use of an offset remedy, is similar to the question presented in No. 86-1786, *United Metal Products Corp.* v. *National Bank of Detroit.* However, as we explained in our brief submitted in that case in response to the court's invitation to the Solicitor General to present the views of the United States (at 10-11 n.8), the decision below allowing offset is not inconsistent with the holding of the Sixth Circuit in *United Metals Products Corp.* that an employer may not garnish the pension plan account of a participant who, unlike petitioners, was not a trustee of the pension plan. Since petitioners do not raise the question whether the anti-alienation provisions bar the offset remedy, there is no reason to hold this petition pending this Court's determination whether to grant the petition in *United Metal Products Corp.* As noted in our brief in that case (at 16-17), the question presented in *United Metal Products Corp.* (but not here) is related to the question presented in No. 86-1387, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, which the Court will hear on the merits; since petitioner raises no question related to the question presented in *Mackey* (and, indeed, does not cite *Mackey* or *United Metal Products Corp.*), there is no reason to hold this petition for that case. (We are serving copies of our briefs in *United Metal Products Corp.* and *Mackey* on counsel for petitioners.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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